Supreme Court, U.S.
FILED
SEP 29 1999
OFFICE OF THE CLERK

No. 99-26

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ROBERT E. HENRY,
Petitioner,

v.

BILL LOCKYER,
California Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER, Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
DAVID F. GLASSMAN
Deputy Attorney General
Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2355
Fax: (213) 897-6496
Counsel for Respondent

23PP

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	3
I. RULE 15(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE, A RULE "INTIMATELY CONNECTED WITH THE POLICY OF THE STATUTE OF LIMITATIONS," DOES NOT APPLY TO HABEAS CORPUS PROCEEDINGS IN GENERAL AND DOES NOT RESCUE PETITIONER FROM HIS INABILITY TO DEMONSTRATE THE JURISDICTIONAL REQUIREMENT OF CUSTODY FOR THIS PROCEEDING IN PARTICULAR	3
INTRODUCTION	3
A. Rule 15(c) And The Relation Back Doctrine Do Not Apply To Habeas Corpus Cases	6
B. The Relation Back Doctrine is Limited to Solve a Statute of Limitations Issue	8

TABLE OF CONTENTS, CONT'D

C. Even Assuming Relation Back Might Apply in a Habeas Case Beyond the Statute of Limitations, it Does Not Apply Here Because the Initial Petition Was Dismissed 8

D. Regardless of Whether Rule 15 (c) Might Ever Apply to a Habeas Corpus Case, it Does Not Apply to Revive a Fatally Defective Original Petition 9

II. THE REGISTRATION REQUIREMENTS OF CALIFORNIA'S SEX OFFENDER REGISTRATION STATUTE DO NOT RENDER A HABEAS PETITIONER "IN CUSTODY" FOR THE PURPOSES OF HABEAS CORPUS 13

CONCLUSION 17

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
Calderon v. United States District Court (Gordon), 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S. Ct. 265 (1997)	11
Calderon v. United States District Court (Taylor), 134 F.3d 981 (9th Cir. 1998)	11
Carafas v. La Vallee, 391 U.S. 234 (1968)	16
Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995)	1, 3, 16
Duncan v. Henry, 513 U.S. 366 (1995)	1
Ex Parte Lange, 18 Wall. 163, 21 L. Ed.872 (1874)	15
Ex Parte Siebold, 100 U.S. 371, 25 L. Ed.717 (1880)	15

TABLE OF AUTHORITIES, CONT'D

Farmer v. McDaniel,
98 F.3d 1548 (9th Cir. 1996),
cert. denied, 117 S. Ct. 1474,
137 L. Ed. 2d 686 (1997) 9, 10

Fay v. Noia,
372 U.S. 391,
83 S. Ct. 822,
94 L. Ed. 2d 837 (1963) 15

Greenawalt v. Stewart,
105 F.3d 1287 (9th Cir. 1997) 11

Harris v. Nelson,
394 U.S. 286,
89 S. Ct. 1082,
22 L. Ed. 2d 281 (1969) 6, 7, 8

Henry v. Estelle,
33 F.3d 1037 (1994) 1

Henry v. Lungren,
164 F.3d 1240 (9th Cir. 1999) 2

Hensley v. Municipal Court,
411 U.S. 345 (1973) 4

Johnson v. Zerbst,
304 U.S. 486,
58 S. Ct. 1019,
82 L. Ed. 130 (1938) 15

TABLE OF AUTHORITIES, CONT'D

Jones v. Cunningham,
371 U.S. 236,
83 S. Ct. 373,
9 L. Ed. 2d 285 (1963) 13, 16

Larche v. Simmons,
53 F.3d 1068 (9th Cir. 1995) 14

Lefkowitz v. Fair,
816 F.2d 17 (1st Cir. 1987) 10, 11

Maleng v. Cook,
490 U.S. 488,
104 L. Ed. 2d 540,
109 S. Ct. 1923 (1989) 13, 16

McNab v. Kok,
170 F.3d 1246 (9th Cir. 1999) 14

Preiser v. Rodriguez,
411 U.S. 475
93 S. Ct. 1827,
36 L. Ed. 2d 439 (1973) 15

Reuter v. Crandell,
109 F.3d 575 (9th Cir.),
cert. denied, 118 S. Ct. 142 (1997) 11

Russell v. Gregoire,
124 F.3d 1079 (9th Cir. 1997),
cert. denied, 118 S. Ct. 1191,
140 L. Ed. 2d 321 (1998) 14

TABLE OF AUTHORITIES, CONT'D

Williamson v. Gregoire,
151 F.3d 1180 (9th Cir. 1999),
cert. denied, 119 S. Ct. 824,
142 L. Ed. 2d 682 (1999) 14

FEDERAL STATUTES

28 U.S.C. §§ 2241(c) 4
2244(d)(1) 7
2254 4, 5, 7

Fed. R. Civ. P. 15(c) 2, 3, 5, 6, 7, 8, 9, 11

Fed. R. Civ. P. 81(a)(2) 7

Penal Code § 290 et seq 13

Penal Code § 290.4 13

Other Authorities

Black's Law Dictionary 709, col. 1 (6th ed. 1990) 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999
No. 99-26

ROBERT E. HENRY,
Petitioner,

v.

BILL LOCKYER,
California Attorney General,
Respondent.

STATEMENT OF THE CASE

Petitioner, a rector and dean of a church day school, was tried and convicted in California state court of sexually molesting a 5-year-old student. At trial he objected on state law grounds to testimony by the parent of another child regarding a similar accusation years before. On direct appeal he renewed his state-law-based challenge to that evidence. The California Court of Appeal found the error harmless and affirmed petitioner's conviction. App. C to Pet. For Cert. 32. Petitioner then filed a petition for writ of habeas corpus in federal court, alleging that the evidentiary error constituted a due process violation. The district court granted the petition and the Court of Appeals for the Ninth Circuit affirmed. *Henry v. Estelle*, 33 F.3d 1037 (1994).

This Court reversed. The Court held that petitioner had not exhausted his state remedies because he had not claimed a violation of any federal constitutional right during state proceedings. *Duncan v. Henry*, 513 U.S. 366 (1995).

Petitioner refiled in state court raising his federal constitutional challenge to the evidence; his petition was denied. Petitioner filed a new federal habeas petition on March 17, 1997, after his release from prison and parole. The district court granted the petition. App. A to Pet. For Cert. 1-3.

The Ninth Circuit reversed. The Court of Appeals held that, for purposes of deeming petitioner "in custody," petitioner's filing of the 1997 petition did not "relate back" to the filing of his original petition, within the meaning of Rule 15(c) of the Federal Rules of Civil Procedure. The Court of Appeals also held that a state's registration requirement for convicted sex offenders does not render the registrant "in custody" for purposes of federal habeas corpus. *Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999).

On August 31, 1999, this Court requested opposition to petitioner's petition for a writ of certiorari.

///
///
///
///
///

REASONS FOR DENYING THE WRIT

ARGUMENT

I.

RULE 15(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE, A RULE "INTIMATELY CONNECTED WITH THE POLICY OF THE STATUTE OF LIMITATIONS," DOES NOT APPLY TO HABEAS CORPUS PROCEEDINGS IN GENERAL AND DOES NOT RESCUE PETITIONER FROM HIS INABILITY TO DEMONSTRATE THE JURISDICTIONAL REQUIREMENT OF CUSTODY FOR THIS PROCEEDING IN PARTICULAR

INTRODUCTION

While in custody as a state prisoner, petitioner filed a federal habeas corpus petition. His case was ultimately decided by this Court on the issue of exhaustion by state remedies. This Court held that petitioner had not fairly presented a constitutional due process claim in state court when he disputed the admissibility of trial evidence. *Duncan v. Henry*, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995).

Following this Court's decision, petitioner renewed his federal attack on his conviction. But by then he had been released from prison and parole. He contends that his more recent habeas corpus petition "relates back" to his original defective petition, within the meaning of Rule 15(c) of the Federal Rules of Civil Procedure. He also

claims he is in lifelong custody because he is subject to California's version of "Megan's Law," requiring him to register with authorities as a convicted sex offender.

The oldest limitation on habeas review of convictions is the requirement of custody. The requirement of custody is at the heart of both issues raised in this case. This requirement is no modern innovation, but an ancient, inherent element of the writ. *See* 28 U.S.C. §§ 2241(c), 2254(a). "Habeas corpus" means "you have the body." *Black's Law Dictionary* 709, col. 1 (6th ed. 1990). In this case, respondent can only answer, "No, I don't."

Old as it is, the custody requirement is not an obsolete relic. It performs an essential function in the workings of the modern, complex federal judicial structure. As Justice Brennan explained:

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.

Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

At the time of filing, petitioner was not in custody. His prior custody was water under the bridge. He stood in the same situation as a defendant convicted of a criminal offense but given a sentence with no incarceration or (as is common) a sentence shorter than the time needed to exhaust state remedies.

Those other defendants get no federal habeas review.[1] See Arg. II, *post*. If this Court were to adopt a rule that unexhausted petitions filed in violation of 28 U.S.C. § 2254(b) operate to preserve an otherwise unavailable form of review, the effect would be to reward improper pleadings that delay review until custody has lapsed. For these reasons petitioner cannot point to any significant debate amongst courts as to either issues he presents.

This case may present a novel question, as the Ninth Circuit observed, but there is no real debate within the federal courts as to the answer to that question. Petitioner cannot and does not point to any significant disagreement amongst the federal courts worthy of a grant of certiorari. The novelty of the issue only highlights the uniqueness of this petitioner's odyssey, not the need for review by this Court.

Rule 15(c) of the Federal Rules of Civil Procedure,[2]

---

1. Nor are collateral consequences of a conviction, such as the registration required of a convicted sex offender, deemed vital enough to justify the drastic step of collateral attack on final judgment. See Arg. II, *post*.

2. This rule provides, in pertinent part, as follows:

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the

a rule "intimately connected with the policy of the statute of limitations," does not apply to habeas corpus proceedings in general or to the question of custody in particular. Advisory Committee's Notes on 1966 Amendments to Fed. R. Civ. P. 15(c).

A. Rule 15(c) And The Relation Back Doctrine Do Not Apply To Habeas Corpus Cases[3]

This Court has noted that "habeas corpus proceedings are characterized as 'civil'" but, recognizing the unique nature of such proceedings, calls that label "gross and inexact." *Harris v. Nelson*, 394 U.S. 286, 293-94, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) [citation omitted]. It is therefore not surprising that "[h]abeas corpus practice in the federal courts has conformed with civil practice only in a general sense." *Id.* at 294. This is true even with regard to the Federal Rules of Civil Procedure. By their own terms, the Federal Rules operate with only restricted applicability in the world of habeas corpus:

---

foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

3. It is respondent's position that, even when limited to the statute of limitations context, as the drafters of the Federal Rules of Civil Procedure clearly intended, Rule 15(c) does not apply to habeas corpus cases.

> These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has theretofore conformed to the practice of civil actions.

Fed. R. Civ. P. 81(a)(2); *see also* Rules Governing § 2254 Cases in the United States District Courts, rule 11 [Federal Rules "may be applied" to habeas cases "to the extent that they are not inconsistent with [§ 2254] rules" and "when appropriate"].

Consistent with this express limitation, this Court has recognized the restricted applicability of the Federal Rules, noting that evidence of the drafters' intent "indicates nothing more than a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings." *Harris v. Nelson*, 394 U.S. at 295. As a result, the Court has determined it has

> no power to decide that [a particular rule] applies to habeas corpus proceedings unless, on conventional principles of statutory construction, [it] can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.

Id. at 298.

As noted previously, and as will be discussed in detail below, the relation back doctrine of Rule 15(c) is exclusively applicable to the amendment of pleadings to include additional claims, defenses, or parties after the applicable statute of limitations has expired. Because prior to the enactment date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and section 2244(d)(1), there was no statutory limitations

period in which a habeas petitioner had to file a petition, there can be no question that Rule 15(c) had absolutely no applicability to habeas corpus cases prior to April 24, 1996. Thus, in light of this Court's decision in *Harris*, it must be concluded that the drafters of the Federal Rules did not contemplate Rule 15(c) applying to habeas corpus cases, as there was no need to "relate back" prior to the enactment of the AEDPA.

B. The Relation Back Doctrine is Limited to Solve a Statute of Limitations Issue

Just as significant, though, is the fact that the rule specifically renders the applicability of the relation back doctrine contingent upon whether the applicable statute of limitations provides for the doctrine. The fact that the rule explicitly states that the applicable statute of limitations may provide for the use of the relation back doctrine is a compelling indication that the doctrine was intended to apply only in the statute of limitations context. Neither the rule itself, nor the Advisory Committee's Notes, discuss the "relation back" doctrine as applying in any context (such as being used to save jurisdiction) other than in the statute of limitations context.

C. Even Assuming Relation Back Might Apply in a Habeas Case Beyond the Statute of Limitations, it Does Not Apply Here Because the Initial Petition Was Dismissed

One need look no further than the specific language of Rule 15(c) and the Advisory Committee's Notes thereto to see that the relation back doctrine was only intended to operate in a limited context. "An **amendment** of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the **statute of limitations** applicable to the

action. . . ." Fed. R. Civ. P. 15(c)(1) (emphasis added). Hence, as an absolute precursor to determining whether the relation back doctrine applies in a given case, there must first be an amendment to an existing pleading.

In this case, petitioner's most recent federal petition, filed after his first petition had been ordered dismissed as unexhausted by this Court, was a completely new action. *Farmer v. McDaniel*, 98 F.3d 1548, 1552 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1474, 137 L. Ed. 2d 686 (1997) [dismissal of unexhausted petition constitutes dismissal of the action; subsequent filing of a new petition is the beginning of a new case]. In other words, petitioner was not amending anything. As such, even if the relation back doctrine generally applied to habeas corpus cases (which it does not), it could not apply here because there was never any amendment to the petition.

D. Regardless of Whether Rule 15 (c) Might Ever Apply to a Habeas Corpus Case, it Does Not Apply to Revive a Fatally Defective Original Petition

Assuming arguendo that Rule 15(c) applies outside of the statute of limitations context, petitioner could still not avail himself to the relation back doctrine because the rule does not apply to a habeas corpus case, like this one, in which a deficient original petition has been dismissed. Stated another way, regardless of whether the present case is analogous to a statute of limitations in a civil case, it still would not qualify for "relation back" under Rule 15(c). If Rule 15(c) is interpreted so as to allow petitioner's 1997 petition to "relate back" to the date of his original 1990 federal petition, petitioner will have been allowed to retain his 1990 filing date just as if the court had held his 1990 petition in abeyance. But that would be forbidden by this Court's decision in *Rose v. Lundy*.

The rule should not be read in a manner that undermines the statute. To allow relation back in these circumstances would reward a petitioner who flatly refuses to exhaust by allowing him or her to eventually relate an exhausted petition back to a fatally deficient petition.

For these reasons, and specifically because of *Rose*, the filing of the 1997 petition in this case may not be treated as a continuation of petitioner's 1990 petition. The dismissal of petitioner's federal habeas petition in CV 90-4064-RMT constituted a dismissal of that action, and "effectively terminated the litigation in district court, sending the parties out of the federal system." *Farmer*, 98 F.3d at 1552. As the district court in this case said, "for purposes of determining whether petitioner is able to satisfy the jurisdictional custody requirements, the relevant date therefore is December 6, 1996, the date Petitioner filed the instant petition." ER 101.

Lefkowitz v. Fair, 816 F.2d 17 (1st Cir. 1987), correctly held that a district court does not retain jurisdiction when -- as here -- custody has expired. In *Lefkowitz*, as in this case, the petitioner filed a first petition while in custody. There, as here, the petition contained unexhausted claims and was ordered dismissed without prejudice. Dr. Lefkowitz, like Mr. Henry, returned to state court to exhaust his state remedies.[4] However, by the time Lefkowitz returned to federal court to file a new petition with exhausted claims, he -- like Mr. Henry -- was no longer in custody. *Id.* at 17-21. The First Circuit concluded that the district court did not retain jurisdiction over the initial unexhausted petition and further concluded that nothing, not even the relation back doctrine, could revive Lefkowitz's custodial status. Thus a jurisdictional

---

4. Unlike Dr. Lefkowitz, petitioner Henry may have in fact failed to exhaust.

prerequisite to pursuing habeas corpus relief was missing.[5] *Id.* at 21, n.4, 21-23.

The reasoning and holding in *Lefkowitz* were correct. The first petition here was dismissed, which ended the action, and petitioner was not in custody at the time the most recent petition was filed. As a result, the district court had no jurisdiction over the matter. Rule 15(c) does not apply to habeas corpus cases in general, does not apply outside the statute of limitations context in any event, and certainly does not apply when there is no legally viable pleading in existence for purposes of relating back. The rule has no relevance here.

The overwhelming weight of authority is that when a first action is dismissed without prejudice, the case reverts to the same status it would have had if the action had never been filed. A second action, to be timely, must be filed within the applicable limitations period. Applying the same principle to the other prerequisites of filing, the second action must meet them, also, as if there had been

---

5. Presumably, the First Circuit utilized, on appropriate occasions, a mechanism similar to abeyance so that a federal court could in fact retain jurisdiction over an unexhausted petition. However, in the Ninth Circuit, mixed petitions must be dismissed, and may no longer be held in abeyance. *Greenawalt v. Stewart*, 105 F.3d 1287 (9th Cir. 1997); *Calderon v. United States District Court (Gordon)*, 107 F.3d 756 (9th Cir.), *cert. denied*, 118 S. Ct. 265 (1997); *Reutter v. Crandell*, 109 F.3d 575 (9th Cir.), *cert. denied*, 118 S. Ct. 142 (1997); and *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998). In other words, absent an express waiver of the exhaustion requirement, there is no legally valid way for a district court to retain jurisdiction over a petition which must be dismissed for failure to totally comply with the exhaustion rule.

no first action. That principle would apply to the custody requirement of habeas corpus as well. To conclude otherwise would improperly insulate this petitioner from the jurisdictional requirement of custody and would frustrate congressional intent in enacting the AEDPA. The unprecedented application of the relation back doctrine in this context would do nothing less than eviscerate the custody requirement.

II.

THE REGISTRATION REQUIREMENTS OF CALIFORNIA'S SEX OFFENDER REGISTRATION STATUTE DO NOT RENDER A HABEAS PETITIONER "IN CUSTODY" FOR THE PURPOSES OF HABEAS CORPUS

In light of petitioner's release from both confinement and official supervision, the threshold issue in this case is whether the consequences to petitioner of California Penal Code sections 290, subdivision (a), 290, subdivision (m) and 290.4 constitute a sufficient restraint on petitioner's liberty to qualify as an unexpired aspect of petitioner's sentence/punishment (as distinguished from merely collateral consequences), which is sufficient in and of itself to satisfy the "in custody" requirement in a federal habeas corpus matter. The Ninth Circuit correctly concluded the registration requirements of Penal Code section 290 *et seq.* do not render a petitioner forever "in custody." Indeed, petitioner can cite virtually no authority to the contrary on the subject of such registration.

A habeas petitioner is "in custody" if, although not incarcerated, he is subject to restriction that "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963). And, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng v. Cook*, 490 U.S. 488, 492, 104 L.Ed.2d 540, 109 S.Ct. 1923 (1989).

Shortly before deciding this case, the Ninth Circuit reviewed the corresponding registration requirement of

Washington's "Megan's Law" statute, and concluded that such a registration requirement places no restraints on an offender's movements. *Williamson v. Gregoire*, 151 F.3d 1180, 1183-1184 (9th Cir. 1999), *cert. denied*, 119 S.Ct. 824, 142 L.Ed.2d 682 (1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied* 118 S.Ct. 1191, 140 L.Ed.2d 321 (1998). In *Russell*, the court considered a habeas petitioner's claim that the registration and notification provisions of the Washington statute deprived him of his Constitutional rights. A unanimous panel rejected the contention, and the court's characterization of the registration requirement is directly applicable here:

> Registration does no more than apprise law enforcement officials of certain basic information. It places no restraint on the offender's movements. . . . The information required to be divulged is not burdensome. . . ."

124 F.3d at 1087; accord *McNab v. Kok*, 170 F.3d 1246 (9th Cir. 1999).

The custody requirement should not be stretched so far that it includes a case in which a petitioner's physical liberty to move is unaffected but he only theoretically faces potential stigma. The risk that an ex-felon may be stigmatized by publicity is not unique to those subject to section 290. As the Ninth Circuit has elsewhere stated,

> [t]o allow the Great Writ to be used in extremely minor cases, after sentences have been served, in the name of defendants who may not face, or perhaps are not concerned with, potential collateral consequences, is not only to cheapen the writ, but also to invite an onslaught of litigation into the federal judiciary.

Larche v. Simmons, 53 F.3d 1068, 1071 (9th Cir. 1995).

Conviction of virtually any felony brings certain consequences, such as the loss of voting privileges or the inability to possess a firearm. Those consequences preclude all felons from doing things that "free people" are entitled to do. But those consequences have never been deemed to satisfy the custody requirement *per se*. Otherwise, ex-felons generally might be considered to be in lifelong custody. At a minimum, all other sex offenders who are subject to section 290 would be in "custody" for life.

As noted in our introduction, the writ of habeas corpus evolved as a remedy available to effect discharge from a confinement contrary to the Constitution. *See Ex Parte Lange*, 18 Wall. 163, 21 L.Ed.872 (1874); *Ex Parte Siebold*, 100 U.S. 371, 25 L.Ed.717 (1880); *Johnson v. Zerbst*, 304 U.S 486, 458, 58 S.Ct. 1019, 82 L.Ed. 130 (1938); *Fay v. Noia*, 372 U.S. 391, 405-409, 83 S.Ct. 822, 830-832, 94 L.Ed.2d 837 (1963). Accordingly, in the cases entertained by this Court, the petitioner's grievance "is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 486, and n.7, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Indeed, that concept was has been termed the 'core of habeas corpus,' 'the heart of habeas corpus,' and the 'essence of habeas corpus'. *Id.* at 1836, 1841, and 1833.

The custody requirement thus serves as a kind of "amount in controversy" requirement for the relitigation of otherwise final criminal cases. Only persons faced with imprisonment or death can seek this extraordinary remedy. Interests in money, property, or reputation, although important, must be vindicated through appeal, not habeas, if the sentence does not include incarceration. When a judgment affecting only those interests becomes final, it is as final as the judgment in a civil case. The habeas exception for criminal cases does not apply.

To be sure, the custody requirement has been expanded on occasion. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) held that parolees were still "in custody." The outer limit was reached in *Carafas v. La Vallee*, 391 U.S. 234, 239 (1968), holding that a habeas case which met the custody requirement when filed need not be dismissed as moot when the petitioner was released.

But *Carafas* emphasized that the petitioner was in custody at the time of filing and hence that the jurisdiction of the federal court had attached. *Id.* at 238; *cf. Maleng v. Cook*, 490 U.S. 488, 491 (1989) (per curiam) (noting *Carafas* does not extend to conviction fully expired at time of petition). *Carafas* also emphasized that the petitioner would otherwise be thwarted by delays he could not possibly have avoided. 391 U.S. at 239-240. This is in sharp contrast to the present case --; a petitioner who has been released from both prison and parole, and one who could have avoided the entire problem simply by plainly stating his due process claim at the appropriate time. *See Duncan v. Henry*, 513 U.S. 364, 366.)

Petitioner asks this Court to reformulate the prerequisite of custody. The net effect of his request would not only dilute the requirement of custody, it would erase it. Petitioner's attempt to circumvent the custody requirement should be rejected.

CONCLUSION

For the foregoing reasons, respondent requests that the petition for writ of certiorari be denied.

Dated: September 28, 1999.

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General

David F. Glassman

DAVID F. GLASSMAN
Deputy Attorney General
Counsel for Respondent

DFG:nla
LA1999US0005